

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**REPLY IN SUPPORT OF DEFENDANTS’ JOINT MOTION IN LIMINE TO
EXCLUDE EVIDENCE OF DEFENDANTS’ ALLEGED WASTE WATER
TREATMENT PLANT DISCHARGES (DKT. NO. 2421)**

Plaintiffs’ *Response to Defendants’ Joint Motion in Limine to Exclude Evidence of Defendants’ Alleged Waste Water Treatment Plant Discharges*, Dkt. No. 2514 (Aug. 20, 2009) (“Opposition”),¹ makes clear that evidence of the original source of water processed by waste water treatment plants (WWTP) in the IRW is truly irrelevant to any point actually at issue in this case.² While dwelling at length on the relevant legal standard, Plaintiffs nowhere explain how such evidence bears on any question of liability arising under the claims they have actually alleged. *See* Opp. at 3, 5-6. Plaintiffs’ claims uniformly allege injury arising from the land application of poultry litter, not the processing of meat products. And, although the existence, amount, and nature of phosphorus discharges from WWTPs in the IRW is relevant to rebutting Plaintiffs’ theory of causation, identification of the sources of inflows to those WWTPs does not

¹ Plaintiffs, without explanation, filed an errata to their Opposition that revised certain substantive arguments. *See* Dkt. No. 2517 (Aug. 21, 2009); *see also* footnote 5, *infra*. To avoid confusion, citations to Plaintiffs’ Opposition are to Plaintiffs’ revised Opposition.

² *See also* *Defendants’ Joint Motion in Limine to Exclude Evidence of Defendants’ Alleged Waste Water Treatment Plant Discharges*, Dkt. No. 2421 (Aug. 5, 2009) (“Motion”).

have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. Plaintiffs’ only intended use of such evidence is to attempt to blame Defendants’ corporate and meat-processing operations for these alternative contributions of phosphorus. Because these allegations are not relevant to Plaintiffs’ substantive allegations, Plaintiffs are merely inviting the factfinder to punish Defendants based on speculative and irrelevant allegations. Accordingly, any such evidence should be excluded under Federal Rule of Evidence 402. *See* Fed. R. Evid. 402 (“Evidence which is not relevant is not admissible.”). Alternatively, the unfair prejudice, confusion and delay that will result from the introduction of such evidence require its exclusion under Federal Rule of Evidence 403.

I. The Evidence Must Be Excluded Under FRE 402 Because the Source of WWTP Discharges Is Not Relevant to Any Aspect of the Litigation

The fact that WWTPs throughout the IRW daily and constantly discharge bacteria and inorganic soluble phosphorous (the type of phosphorous that supports algal growth) directly into the waters of the IRW that Plaintiffs allege Defendants have polluted is unquestionably relevant to this litigation as it undercuts Plaintiffs’ claims of causation. *See* Mot. at 3-4; *Attorney General of the State of Oklahoma v. Tyson Foods*, 565 F.3d 769, 777-79 (10th Cir. 2009).³ Rather than account for such alternate sources of bacteria and phosphorous, Plaintiffs’ Opposition confirms their intention to attempt to blame Defendants for them. Plaintiffs argue that “Dr. Engel analyzed the source inputs to the WWTPs in the IRW and concluded that Defendants contribute phosphorus to these WWTPs” as a result of their corporate and meat-processing operations. Opp. at 2; *see* Mot. Ex. A at 28-31 (purporting to quantify Defendants’ industrial phosphorus

³ Indeed, Plaintiffs’ Opposition and expert, Dr. Engel, both concede that such evidence is relevant to Plaintiffs’ theory of causation. *See* Opp. at 3; Mot. Ex. A at 28-31.

discharges and opining that “defendants’ processing facilities discharge a significant amount of [phosphorus] to WWTPs and thus contribute to point [phosphorus] sources within the IRW”). But, as detailed in Defendants’ Motion, Plaintiffs’ case against Defendants has consistently focused solely on “non-point sources,” not “point sources” such as WWTPs. Therefore, the original source of waters contributing to WWTP discharges is wholly irrelevant to Plaintiffs’ substantive claims. *See* Mot. at 4-6. Plaintiffs’ Opposition fails to identify any legitimate basis to permit the introduction of such evidence at trial.

As an initial matter, Plaintiffs do not—and based on their representations to this Court cannot—contend that the evidence is relevant to a finding of liability. *See* Opp. at 3, 5 (“the State does not intend to affix liability on Defendants on the basis of their phosphorus contributions to WWTPs”); Mot. at 2.⁴ Instead, Plaintiffs assert that this evidence is somehow relevant to the causation analysis, based on the following argument:

Defendants ... admit that WWTP phosphorus discharges will be a principal component of their argument that the State cannot prove poultry waste applied to fields affects phosphorus levels in the IRW. If Defendants make this argument, the State must have a chance to address, analyze and explain what the WWTP discharges represent -- including the fact that Defendants are a contributor to the phosphorus contained in these WWTP discharges.

Opp. at 3 (internal citations omitted); *see also* Opp. at 5 (“[T]he State is entitled to answer Defendants’ likely argument that WWTPs are the major contributor of phosphorus to the IRW

⁴ As detailed in Defendants’ Motion, Plaintiffs’ claims are based solely on phosphorus contributions from “non-point” sources resulting from the land application of poultry litter in the IRW—a fact confirmed by Plaintiffs’ affirmative representations that their claims are not premised upon any point-source discharges (such as WWTP discharges) regulated under the Clean Water Act. *See* Mot. at 2; *see, e.g.*, Dkt. No. 134 at 10, 13; Dkt. No. 129 at 5-6, 10-22. Moreover, it is well established that Defendants cannot be held liable for WWTP discharges from municipal or county waste treatment plants operating pursuant to state-issued permits authorizing this activity. *See* Mot. at 1-2; *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 869-70, 888 (9th Cir. 2001) (“Because [plaintiff] failed to show that the [utilities] violated the NPDES permits ... any pollutants discharged into the storm water were permissible.”).

[by] ... fully inform[ing] the trier of fact as to the circumstances under which WWTPs add phosphorus to the IRW.”). But, Plaintiffs’ explanation fails to identify a single “fact that is of consequence to the determination” of the causation analysis that would be made “more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.⁵ Plaintiffs’ essential allegation is that injury in the IRW is caused by the land application of poultry litter. The fact that WWTP discharges contribute phosphorous to the IRW contradicts that claim, *regardless of where those waters originated*. Plaintiffs’ statements make clear that the proffered evidence constitutes nothing more than a transparent attempt to blame Defendants for being “a contributor to the phosphorus contained in these WWTP discharges” in the hopes of misleading or confusing the finder of fact to conclude that Plaintiffs’ failure to account for this alternate source of phosphorus in the IRW is somehow harmless because some aspect of Defendants’ operations are really to blame even if it turns out that poultry litter is not the primary source of phosphorus in IRW waters.

The original source of WWTP phosphorus discharges—whether contributed by private individuals, municipalities or Defendants’ corporate and meat-processing operations—is immaterial to any aspect of this litigation, including the causation analysis. As an alternate source of phosphorus, WWTP discharges are relevant to demonstrate that Plaintiffs cannot establish a causal link between phosphorus in IRW waters and the phosphorus compounds found in poultry litter. *See* Mot. at 3-4; Opp. at 3; *Tyson Foods*, 565 F.3d at 777-79. The identity of

⁵ Plaintiffs’ tardy errata revised their Motion to assert that “this evidence tends to make a relevant fact, namely the contribution of phosphorus from poultry waste land application versus alternative sources more likely.” *Compare* Dkt. No. 2517 at 3 (errata), *with* Dkt. No. 2514 at 3. However, Plaintiffs fail to explain how the identity of the contributors to WWTP discharges has any relevance to determining whether contributions of phosphorus from poultry litter versus alternative sources is more likely. As detailed *infra*, the proposed evidence is wholly immaterial to this causation analysis.

the contributors to WWTP discharges does nothing to support the existence of this required causal link between phosphorus in IRW waters and land-applied poultry litter, nor does it obviate the need to account for such alternate source(s) of phosphorus in any causation analysis.⁶ The proffered evidence is simply not relevant to any determination of consequence in this matter. Accordingly, the evidence must be excluded under Rule 402.

II. Exclusion is Also Proper under FRE 403 Because the Evidence Is Prejudicial and Will Likely Cause Confusion and Delay Without Adding Any Probative Value

Evidence of Defendants' contributions to WWTP discharges should likewise be excluded because its probative value, if any, is substantially outweighed by the unfair prejudice, confusion and undue delay that will likely result from the presentation of such evidence. *See* Fed. R. Evid. 403. As detailed *supra*, the evidence that Plaintiffs seek to admit lacks any probative value in the present litigation. To maintain "probative value," the evidence must "tend[] to prove an issue" relevant to the determination of a fact in dispute. *Black's Law Dictionary*, 1203 (6th ed. 1991); *see also* Fed. R. Evid. 401. Because Defendants' alleged contributions to WWTP discharges are not relevant to any aspect of this litigation, the evidence necessarily lacks any probative value.

In contrast, the proffered evidence and testimony is clearly misleading and unfairly prejudicial to Defendants. Plaintiffs contend that "[t]he State is entitled to answer Defendants' likely argument that WWTPs are the major contributor of phosphorus to the IRW" by asserting that Defendants are responsible for the WWTP phosphorus discharges in the IRW. *Opp.* at 5. But, in so doing, Plaintiffs are purposefully inviting the finder of fact to conclude (in contravention of the law) that Plaintiffs' failure to account for WWTP phosphorus discharges in

⁶ Plaintiffs' argument would be akin to asserting that the identity of cattle and dairy cow owners in the IRW is a relevant fact to the causation analysis.

their causation analysis is somehow harmless because Defendants’ operations would nevertheless be to blame even if poultry litter is not the source of the alleged phosphorus in IRW waters. *See id.* at 3, 4-5. This attempt to dissuade the trier of fact from properly applying the law typifies the unfair prejudice that Rule 403 seeks to exclude. *See United States v. Caraway*, 534 F.3d 1290, 1301 (10th Cir. 2008) (“To be unfairly prejudicial, the evidence must have ‘an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.’” (quoting Fed. R. Evid. 403 advisory committee’s note)). Because liability cannot be imposed in this litigation based on alleged phosphorus contributions from legally authorized point-source discharges, any introduction of the proposed evidence and testimony will unfairly prejudice Defendants.

Plaintiffs assure the Court that allowing evidence of the sources of WWTP discharge water will not unduly distract from the main issues of the litigation. *See Opp.* at 5. But if Plaintiffs are permitted to bring in such irrelevant information to muddy their own failure to account for alternate sources of phosphorous, Defendants will be required to introduce extensive evidence, testimony and argument demonstrating the nature, amount and legality of the Defendants’ “contributions” to WWTPs—all of which are authorized to discharge in compliance with NPDES permits—and their complete lack of relevance to Plaintiffs’ claims. *See Mot.* at 7. Such a result would confuse the issues actually in dispute, uselessly delay the trial, and is to be avoided in accordance with Rule 403. *See, e.g., Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir. 1997) (affirming exclusion of evidence of “limited” probative value that “could have lead to a side trial that would distract the jury from the main issues in the case”); *United States v. Talamante*, 981 F.2d 1153, 1156 & n.5 (10th Cir. 1992) (supporting exclusion of evidence that would “lead to collateral mini trials”).

The lack of any probative value conferred by the proposed evidence is clearly and

“substantially outweighed by the danger of” misleading the trier of fact, unfair prejudice, confusion of the issues, and considerations of undue delay. Fed. R. Evid. 403. As a result, the Court should exercise its discretion to exclude the evidence under Rule 403.

CONCLUSION

Evidence quantifying or attributing Defendants’ alleged contribution to WWTP phosphorus discharges in the IRW is wholly immaterial and irrelevant to this litigation. For the foregoing reasons, the Court should grant Defendants’ motion in limine at Docket No. 2421 to exclude the proposed evidence pursuant to Federal Rules of Evidence 402 and 403.

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